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In the Supreme Court of the United States

OCTOBER TERM, 1991

NATIONWIDE MUTUAL INSURANCE COMPANY, ET AL.,
PETITIONERS

v.

ROBERT T. DARDEN

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a person who operates his own insurance business under an agreement to represent one insurance company on an exclusive basis is an "employee" of that insurance company under Section 3(6) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1002(6).

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INTEREST OF THE UNITED STATES

The issue in this case is whether respondent Robert T. Darden, an insurance agent, was an "employee" of petitioners, the Nationwide insurance companies, within the meaning of Section 3(6) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1002(6). The Department of Labor and the Internal Revenue Service have substantial administrative responsibilities under the Act. See Reorg. Plan No. 4 of 1978, § 101, 5 U.S.C. App. at 1374. Performance of those responsibilities often depends upon the definition of "employee," because that term is used in a variety of provisions throughout the Act. These agencies have accordingly issued opinions and adopted positions concerning the proper definition of the term "employee" under ERISA.

For example, the Department of Labor recently issued an opinion letter on the issue of whether a health plan was a "multiple employer welfare arrangement" within the meaning of Section 3(40) of ERISA, 29 U.S.C. 1002(40), which turned on whether the participants in the plan were employees of the company marketing the plan. Dep't of Labor, Op. Ltr. 91-17A (Apr. 5, 1991). The IRS is also required to determine who are "employees" of a company, because the minimum participation rules of Title II of ERISA, 26 U.S.C. 401-410, only provide favorable tax treatment of pension plans if benefits are extended to a broad group of "employees." Because this case involves the meaning of one of ERISA's basic definitional terms, the United States has a strong interest in the resolution of the question presented.

STATUTORY PROVISIONS INVOLVED

1. Section 3(2)(A) of ERISA, 29 U.S.C. 1002(2)(A), provides in pertinent part:

> Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—
>
> > (i) provides retirement income to employees, or
> >
> > (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond[.]

2. Section 3(6) of ERISA, 29 U.S.C. 1002(6), provides:

> The term "employee" means any individual employed by an employer.

STATEMENT

1. a. From 1962 through 1980, respondent Robert T. Darden sold Nationwide insurance in Spring Lake, North Carolina, pursuant to the terms of a series of agency agreements. The pertinent terms of the agreement are not in dispute. Darden was required to represent Nationwide on an exclusive basis, and Nationwide compensated Darden by payment of commissions based on his sales performance. Darden controlled the manner in which he performed his sales responsibilities: he rented and later purchased an office at his own expense; he determined his own hours; he was free to solicit sales "wherever, whenever, and from whomever he wished"; and he hired and fired his office help. Pet. App. 48a-49a; Br. in Opp. App. 20a. Neither party characterized the agency relationship as one of employment in their formal records. Nationwide's business records listed Darden as an "independent contractor and not an employee." Pet. App. 49a. Similarly, Darden's tax returns reported his commission income and business expenses as income derived from a sole proprietorship—not as income derived from employment. *Ibid.*

Although Darden was not eligible to participate in the pension plan Nationwide maintained for those individuals it considered to be its employees, the agency agreements did establish a "Deferred Compensation Incentive Plan" and an "Extended Earnings Plan" for insurance agents such as Darden. Under the terms of the deferred compensation incentive plan, "Nationwide maintained a retirement account for Darden and annually credited to that account a sum based on Darden's earnings from original and renewal fees for insurance policies." Pet. App. 33a. Under the extended earnings plan, "Nationwide agreed to pay Darden, upon his retirement, termination, death or disability, a sum equal to his earnings from renewal fees over the prior twelve months." *Id.* at 34a. The agency agreements also provided that

Nationwide's obligation to pay such benefits would cease if Darden competed with Nationwide within a twenty-five-mile radius of Darden's former business location within one year after the cancellation of the agency agreement, or induced a Nationwide policyholder to cancel an insurance contract with Nationwide at any time after the termination of the agency relationship. *Ibid.*

b. In 1980, shortly after Nationwide terminated Darden's agency contract because the company determined that Darden was a "marginal agent," Darden began competing with Nationwide at the same business location he had used while representing Nationwide. Pet. App. 48a. Consequently, Nationwide informed Darden that it would not pay him his deferred compensation benefits, which amounted to $28,664 at the time of his termination, or his extended earnings benefits, which amounted to $65,706. *Id.* at 34a.

Darden then brought this action against Nationwide under Section 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a). Darden claimed that he was a "participant" entitled to bring suit under Section 502(a); the plans were "pension plans" within the meaning of Section 3(2)(A), 29 U.S.C. 1002(2)(A); and his benefits under the plans had become nonforfeitable pursuant to Section 203(a), 29 U.S.C. 1053(a). Darden's claims depended in part on whether he was an "employee" under Section 3(6), 29 U.S.C. 1002(6): first, he could only qualify as a "participant" entitled to bring suit under Section 502(a) if he was an "employee or former employee" of Nationwide, Pet. App. 36a-37a; § 3(7), 29 U.S.C. 1002(7), and second, Section 3(2)(A) defines a "pension plan" as a plan that "provides retirement income to *employees*" or "results in a deferral of income by *employees* for periods extending to the termination of covered employment or beyond," 29 U.S.C. 1002(2)(A) (emphasis added). If Darden was an "employee" he would be entitled to the benefits withheld by Nationwide, as long as the benefits were in the nature of "pension" benefits, because (1) the benefits he claimed would have been vested under the terms of ERISA, and (2) Section 203(a) of ERISA would have precluded forfeiture of those benefits under the noncompetition clauses of the agency agreement.

2. The district court initially concluded that Darden was not an employee of Nationwide based upon decisions of this Court interpreting Congress's use of the term "employee" in other remedial social legislation. The district court relied upon the common law agency factors this Court used in *United States* v. *Silk*, 331 U.S. 704 (1947), to determine whether truck drivers were employees for purposes of the Social Security Act. The court considered "(1) [the] degree of control over the workers; (2) the opportunity for the worker for profit or loss from his own efforts; (3) the investment by the workers in equipment; (4) the permanency of the relationship; and (5) the skill required of the workers to carry out their duties." Pet. App. 49a-50a.[1] The district

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[1] Those factors were borrowed from the common law test set forth in the Restatement (Second) of Agency § 220 (1958). The Restatement defines a "servant" as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." *Id.* § 220(1). The Restatement sets out ten factors for consideration "[i]n determining whether one acting for another is a servant or an independent contractor," *id.* § 220(2):

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;

court also relied on this Court's conclusion in *NLRB* v. *United Insurance Co.*, 390 U.S. 254, 258 (1968). In defining the term "employee" under the National Labor Relations Act, the Court observed that "[w]hat is important is that the total factual context is assessed in the light of the pertinent common-law agency principles." Pet. App. 50a.

Based upon these principles, the district court concluded that " '[t]he total factual context' of Mr. Darden's relationship with Nationwide shows that he was an independent contractor and not an employee." Pet. App. 50a. The district court emphasized that "it was primarily through [Darden's] own efforts, ingenuity, and good business sense that he made money." *Id.* at 49a.

3. The court of appeals reversed. Pet. App. 32a-46a. The court recognized that under "traditional common law principles, Darden most probably would not qualify as an employee." *Id.* at 39a.[2] But the court held that "the

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(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

This test was developed to determine when a third party can recover against a principal for the tortious conduct of an agent, but it has been used by state courts in a variety of contexts.

[2] In reaching that conclusion, the court noted that "Darden was relatively free to run his business as he chose"; he "was compensated through commissions, rather than through a salary," and "received his commissions from Nationwide without deduction for income taxes or other charges"; "[h]e paid his business expenses out of his commissions, including office maintenance and utilities and the salaries of his clerical staff"; he "owned the building housing his agency's offices and the furniture used there, as well as an automobile maintained for business purposes"; and "Darden and Nationwide referred to their relationship as one between independent contractors," so that he "was not entitled to receive certain benefits reserved for Nationwide 'employees.' " Pet. App. 39a-40a.

common-law test for the relationship of master and servant is not the appropriate standard for application here." *Id.* at 40a. In reaching that conclusion, the court of appeals relied on this Court's decisions in *Silk* and *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 120-129 (1944), which indicate "that the definition of 'employee' should be tailored to the purposes of the statute being construed." Pet. App. 40a. Thus rejecting "the common-law test of master and servant," the court fashioned a test "focusing on the objectives and purposes of ERISA," *id.* at 43a, from the congressional statement of purpose set out in Section 2 of ERISA, 29 U.S.C. 1001.[3] The court of appeals described its test as follows, Pet. App. 41a-42a:

> The protected class described in the statement of purpose encompasses, first of all, persons whose retirement benefits were 'anticipated.' * * * Second, persons within the protected class must have relied on that expectation by remaining for 'long years,' or a substantial period of time, in the 'employer's' service, and by foregoing other significant means of providing for their retirement. * * * Finally, implicit in the congressional statement of purpose is the recognition that the persons to be aided by the statute lacked sufficient economic bargaining power to obtain contractual rights to nonforfeitable benefits.

Applying its test, the court determined that "Nationwide created a reasonable expectation on Darden's part that benefits would ultimately be paid to him." Pet. App. 41a. The court also indicated that "[t]here is also evidence in the record indicating Darden's reliance on that expectation." *Id.* at 42a. The court nevertheless remanded the case for further factual development on the issues of Darden's reliance and "the respective bargaining strength of the parties." *Id.* at 43a.

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[3] In Section 2, Congress said that because "many employees with long years of employment are losing anticipated retirement benefits," it was taking steps to assure "the equitable character of such plans and their financial soundness." See Pet. App. 41a.

4. On remand, the district court determined that Darden had relied on the availability of Nationwide's deferred compensation benefits. This finding rested primarily on evidence that Darden had not otherwise made adequate financial arrangements for his retirement. With respect to the issue of bargaining power, the court found that Nationwide "received input from its agents" regarding the terms of the agency agreements, but that Nationwide nevertheless "felt free to disregard any advice it received" from them. Pet. App. 21a. Accordingly, the court found "that Darden, and Nationwide agents as a group, lacked sufficient bargaining power to obtain the contractual right to nonforfeitable retirement benefits from Nationwide." *Id.* at 23a.

The district court next determined that the deferred compensation plan—pursuant to which "Nationwide maintained a retirement account for Darden and annually credited to that account a sum based on Darden's earnings from original and renewal fees for insurance policies," Pet. App. 33a—was a "pension plan" under Section 3(2)(A) of ERISA and that his benefits had vested pursuant to Section 203(a). Pet. App. 24a, 31a. However, the district court determined that the extended earnings plan—pursuant to which "Nationwide agreed to pay Darden, upon his retirement, termination, death or disability, a sum equal to his earnings from renewal fees over the prior twelve months," *id.* at 34a, was not a pension plan. *Id.* at 5a. Since ERISA's nonforfeiture rule applies only to pension plans, and not to other sorts of employee benefit plans, the court held that the clause in Nationwide's plan providing for the forfeiture of benefits if the agent competes with Nationwide was not invalid with respect to the extended earnings plan.

5. The court of appeals affirmed. Pet. App. 1a-12a. It "agree[d] with the district court's conclusion that Darden was an employee under ERISA," *id.* at 8a; the finding "that the Deferred Compensation Plan represented an ERISA 'pension plan,'" *id.* at 9a; and the finding "that the Extended Earnings Plan did not constitute a pension plan under ERISA," *id.* at 11a. Accordingly, under the court of appeals' judgment, Darden is entitled to the money in his deferred compensation account, but is not entitled to benefits under the extended earnings plan.

In its petition for a writ of certiorari, Nationwide contended that the court of appeals erred by holding that Darden is an employee within the meaning of Section 3(6) of ERISA.

SUMMARY OF ARGUMENT

1. Congress did not regulate all arrangements that provide for retirement or medical benefits. Instead, Congress expressly restricted ERISA's reach to *employee* benefit plans. This Court has made clear that congressional use of the term "employee" in remedial social legislation, like ERISA, must be defined through reference to the common law of agency, applied in light of the remedial purposes of the legislation. *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 729-730 (1947) (Fair Labor Standards Act); *United States* v. *Silk*, 331 U.S. 704, 712 (1947) (Social Security Act).

2. Consistent with these precedents, the Department of Labor and the Internal Revenue Service have both interpreted "employee" in Section 3(6) primarily with reference to the common law test, but have applied those factors in light of the purposes of the Act. For example, the Department recently determined that the participants in a health care plan were employees of the *clients* of the company that marketed the health care plan. Even though the agreement between the clients and the company stated that the participants were employees of the company marketing the plan, the participants were employees of the clients because they were subject to the control of the clients. Dep't of Labor, Op. Ltr. No. 91-17A (Apr. 5, 1991). Similarly, the IRS successfully argued that professionals could not evade ERISA's minimum participation requirements by "leasing" themselves to their prac-

tices, since under common law principles they were not employees of the leasing company, which did not control the manner in which services were provided. *Professional & Executive Leasing, Inc.* v. *Commissioner*, 89 T.C. 225, 231-235 (1987), aff'd, 862 F.2d 751 (9th Cir. 1988).

The courts of appeals have followed a similar approach tied to common law factors. The Fourth Circuit is in fact alone in its decision to disregard the common law approach in favor of its own novel definition of an "employee." *Mayeske* v. *International Ass'n of Fire Fighters*, 905 F.2d 1548, 1553-1555 (D.C. Cir.), cert. denied, 111 S. Ct. 347 (1990); *Penn* v. *Howe-Baker Eng'rs, Inc.*, 893 F.2d 1096, 1102 n.6 (5th Cir. 1990); *Wolcott* v. *Nationwide Mutual Ins. Co.*, 884 F.2d 245, 250 (6th Cir. 1989); *Holt* v. *Winpisinger*, 811 F.2d 1532, 1538 (D.C. Cir. 1987).

3. The test devised by the court of appeals in this case does not conform to congressional intent. It has no basis in the text of the statute and departs from the common law test altogether. It is also unworkable on a practical level. By focusing on factors such as anticipation of benefits, reliance, and relative bargaining power, the test makes "employee" status inherently unclear and subject to change. That, in turn, renders the legal status of pension plans uncertain, since such plans are subject to ERISA's requirements and qualify for its advantages only if they provide retirement income to employees.

The flawed nature of the Fourth Circuit's test is also illustrated by the fact that it led the court to conclude that Darden—the sole proprietor of his own business—is an employee. In contrast, the district court's initial decision applied the proper test and reached the correct result. As the district court found, an individual, such as Darden, who makes money "primarily through [his] own efforts, ingenuity, and good business sense," is an independent contractor, and is therefore excluded from ERISA's coverage. Pet. App. 49a.

ARGUMENT

A PERSON WHO OPERATES HIS OWN INSURANCE BUSINESS PURSUANT TO AN AGREEMENT TO REPRESENT ONE INSURANCE COMPANY ON AN EXCLUSIVE BASIS IS AN "INDEPENDENT CONTRACTOR," NOT AN "EMPLOYEE" OF THAT INSURANCE COMPANY UNDER SECTION 3(6) OF ERISA

ERISA does not cover all plans providing benefits of the sort listed in Section 3(1) and (2) of the Act, 29 U.S.C. 1002(1) and (2). That is, Congress did not say, for example, that any plan providing retirement income or medical benefits is subject to the Act. Instead, Congress limited the coverage of ERISA to *employee* benefit plans: to pension plans to the extent that they provide retirement income to "employees," 29 U.S.C. 1002(2)(A), and to welfare plans to the extent that they provide benefits to "participant[s]," 29 U.S.C. 1002(1), which the Act in turn defines to mean certain "employee[s]" or "former employee[s]," 29 U.S.C. 1002(7).[4] Indeed, Congress provided that, as used in the Act, "pension plan" is a shorthand for "employee pension benefit plan" and "welfare plan" is a shorthand for "employee welfare benefit plan." 29 U.S.C. 1002(2)(A), 1002(1).

A. This Court Has Made Clear That The Term "Employee," As Used In Remedial Social Legislation, Is Defined With Reference To The Common Law Factors Construed As A Whole And In Light Of The Purposes Of The Statute At Issue

Although the term "employee" is a basic component of ERISA, the statutory definition set forth in Section 3(6) of the Act—"any individual employed by an employer"—

[4] The restriction to employees is in line with the purposes of the Act, which is called the *Employee* Retirement Income Security Act and was enacted in part because "employee benefit plans * * * have become an important factor affecting the stability of employment and the successful development of industrial relations." 29 U.S.C. 1001(a).

provides essentially no guidance on its face. However, this "circular" definition, *Mayeske* v. *International Ass'n of Fire Fighters*, 905 F.2d 1548, 1552 (D.C. Cir.), cert. denied, 111 S. Ct. 347 (1990), derives meaning from prior judicial construction of the term "employee" in various statutes and this Court's repeated decisions holding that the term should be construed with reference to the factors considered under the common law of agency.[5]

In a recent decision involving the question of employee status under the 1976 Copyright Act, the Court stated that "when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Community for Creative Non-Violence* (*CCNV*) v. *Reid*, 490 U.S. 730, 739-740 (1989) (citing Federal Employer Liability Act cases).[6] The ultimate question under the common law test is whether "with respect to his physical conduct in the performance of the service," the person "is subject to the other's control or right to control." Restatement (Second) of Agency § 220(1) (1958). This focus on the right to control flows naturally from the original purpose of the common law test, which was to determine whether a party should be held vicariously liable for another person's tortious acts.

In cases involving remedial social legislation, the Court has relied primarily on the factors used to determine whether an individual would be considered a "servant"

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[5] The meaning of "employee" in Section 3(6) is necessarily a matter of federal law. See *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989), quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987) ("we have held that courts are to develop a 'federal common law' of rights and obligations under ERISA-regulated plans").

[6] The Court found further support for its conclusion that reference to the common law test was warranted because the term "scope of employment" in the Copyright Act provision at issue was "a widely used term of art in agency law." 490 U.S. at 740.

for purposes of the common law test, see n.1, *supra*, but has emphasized the need to tailor the application of such factors to further the particular congressional scheme. The Court has concluded that Congress did not intend to confine the definition of "employee" in such statutes to the strict application of common law principles governing vicarious liability. For example, under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, the Court suggested that "many persons" who might not be employees under the common law standard might nevertheless be employees under the FLSA. *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 729 (1947).[7] The Court nevertheless considered factors similar to those analyzed under the common law of agency, and the Court's conclusion would in fact appear to be consistent with the common law test. See also *NLRB* v. *United Insurance Co.*, 390 U.S. 254, 258 (1968) (National Labor Relations Act); *Bartels* v. *Birmingham*, 332 U.S. 126, 130 (1947) (Social Security Act).

In *Rutherford Food*, the issue was whether persons working as butchers in a slaughterhouse were employees entitled to overtime pay, and the Court relied on the fact that "[t]he premises and equipment of [the slaughterhouse] were used for the work"; "[t]he group had no business organization that could or did shift as a unit from one slaughterhouse to another"; and "[t]he managing official of the plant kept close touch on the operation." 331 U.S. at 730. The Court concluded that while "profits to the [butchers] depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor."

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[7] The FLSA is particularly relevant here since the definition of "employee" under that Act—"any individual employed by an employer," see 331 U.S. at 728 n.6 (quoting ch. 676, § 3(e), 52 Stat. 1060)—is identical to the definition of "employee" in Section 3(6) of ERISA.

Ibid.[8] Viewing "the circumstances of the whole activity," the Court held that the butchers were employees rather than independent contractors. *Ibid.*[9]

Thus, while "reject[ing] the test of the 'technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants,'" *United States* v. *Silk*, 331 U.S. 704, 713 (1947), the Court has also repeatedly borrowed factors developed under the common law of agency.[10] Those factors have been applied in a

[8] In this case, in contrast, the district court found that "it was primarily through [Darden's] own efforts, ingenuity, and good business sense that he made money." Pet. App. 49a. The court of appeals did not disagree—it stated that under "traditional common law principles, Darden most probably would not qualify as an employee," *id.* at 39a—but instead departed completely from the factors considered under the common law test.

[9] As illustrated by the cases from the 1940s involving remedial social legislation and the cases cited in *CCNV* v. *Reid*, 490 U.S. at 740, this Court has long construed "employee" in light of the common law of agency and the purposes of the statute at issue. Congress was presumably aware of that practice when it enacted ERISA in 1974. See *Albernaz* v. *United States*, 450 U.S. 333, 341-342 (1981) ("Congress is 'predominantly a lawyers body' * * * and it is appropriate for us 'to assume that our elected representatives . . . know the law'").

[10] The courts of appeals have similarly rejected application of a strict common law test for determining employee status for purposes of social legislation, while in many instances relying upon a variety of common law factors in fashioning a test. See, *e.g.*, *Donovan* v. *DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1382 (3d Cir.) (FLSA), cert. denied, 474 U.S. 919 (1985); *EEOC* v. *Zippo Mfg. Co.*, 713 F.2d 32, 37 (3d Cir. 1983) (ADEA); *Cobb* v. *Sun Papers, Inc.*, 673 F.2d 337, 341 (11th Cir.) (Title VII of the 1964 Civil Rights Act), cert. denied, 459 U.S. 874 (1982); *Clarkson Constr. Co.* v. *OSHRC*, 531 F.2d 451, 457-458 (10th Cir. 1976) (OSHA); *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d 1255, 1261 (4th Cir. 1974) (same); cf. *Korea Shipping Corp.* v. *New York Shipping Ass'n*, 880 F.2d 1531, 1535 (2d Cir. 1989) (Title IV of ERISA); *Avis Rent A Car Sys., Inc.* v. *United States*, 503 F.2d 423, 428-430 (2d Cir. 1974) (applying *Silk* and *Bartels*-type analysis in a tax refund action).

manner designed "to accomplish the purposes of the legislation," *id.* at 712, but this Court has never departed entirely from the common law test.[11]

B. The Term "Employee" In Section 3(6) Of ERISA Should Be Defined Primarily With Reference To The Factors Of The Common Law Test, Which Should Be Applied In Light Of The Remedial Purposes Of The Act

As applied to ERISA, this Court's decisions make clear that "employee" should be defined with reference to the

[11] In *Silk*, upon which the court of appeals relied as support for departing from the common law test, Pet. App. 40a, the Court stated that "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation," 331 U.S. at 716—all of which are considered under the common law test, see n.1, *supra*—are important in determining whether an individual is an employee under the Social Security Act. In *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944), upon which the court of appeals also relied, Pet. App. 40a, the Court departed from the common law test to a greater extent than in any other case. But even there, where the Court determined that the National Labor Relations Board had not erred by determining that certain "newsboys" were employees, the Court noted that "[i]n addition to effectively fixing the compensation, [the publishers] in a variety of ways prescribe, if not the minutiae of daily activities, at least the broad terms and conditions of work." 322 U.S. at 117-118. It added that the Board had found that the publishers controlled the newsboys by "dictat-[ing] their buying and selling prices, fix[ing] their markets and control[ing] their supply of papers," supervising (and to some extent prescribing) "[t]heir hours of work and their efforts on the job," and furnishing "[m]uch of their sales equipment and advertising materials"—all factors that are relevant under the common law test. *Id.* at 131. Moreover, *Hearst Publications* is questionable authority for the proposition that when Congress uses the word "employee" without providing a specific definition it intends the courts to construe the term without reference to the common law, since Congress amended the National Labor Relations Act (NLRA) following the decision to provide that "any individual having the status of an independent contractor" under the common law test is not an employee under the NLRA. See *NLRB* v. *United Insurance Co.*, 390 U.S. 254, 256 (1968).

common law factors applied in light of the remedial purposes of the statute.[12]

1. a. In its advisory opinions issued with respect to employee status under ERISA, the Department of Labor has endeavored to apply a modified common law test of the sort utilized by this Court in cases involving similar statutes. For instance, in a recent opinion letter addressing whether the inquirer's health plan constituted a "multiple employer welfare arrangement" under ERISA, the Department of Labor wrote that the existence of an employer-employee relationship "will be determined by applying common law principles, taking into account the remedial purposes of ERISA." Dep't of Labor, Op. Ltr. No. 91-17A at 1, 3 (Apr. 5, 1991) (*reprinted at* Reply to Br. in Opp. App. 1a, 4a). The Department continued, echoing the common law test: "consideration must be given to, among other things, whether the person for whom services are being performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also to the details and means by which the result is to be accomplished." *Ibid.*

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[12] ERISA falls squarely within the tradition of remedial social legislation which the courts have construed liberally. As this Court has noted, "[o]ne of Congress' central purposes in enacting [ERISA] was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 374 (1980) (footnotes omitted). Congress enacted ERISA to ensure, among other things, that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whtatever conditions are required * * * —he actually will receive it." *Id.* at 375. See also *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 720 (1984); *Smith* v. *CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984); *Kross* v. *Western Elec. Co.*, 701 F.2d 1238, 1242 (7th Cir. 1983); *Eaves* v. *Penn*, 587 F.2d 453, 457 (10th Cir. 1978). "[T]his overwhelming evidence of the remedial purpose of ERISA must be given due weight in construing provisions whose language and specific legislative history are susceptible of varying interpretations." *Rettig* v. *PBGC*, 744 F.2d 133, 155 n.54 (D.C. Cir. 1984).

In that letter, the Department considered whether persons who worked for companies that subscribed to health care plans marketed by Synesis Service Corporation were employees of Synesis. Even though the agreements between Synesis and its clients referred to the participants in the plans as employees of Synesis, the Department concluded that they were not Synesis employees since the contract further specified that the clients, and not Synesis, had "the sole responsibility for recruiting, hiring, training, evaluating, replacing, supervising, disciplining and firing" the participants. Op. Ltr. 91-17A at 2; Reply to Br. in Opp. App. 2a. The primary reason for the contractual provision reciting that the participants were employees of Synesis appeared to be to evade Section 514(b)(6)(A) of ERISA, 29 U.S.C. 1144(b)(6)(A), which provides that, despite ERISA's broad preemption provision, the States may regulate multiple employer welfare arrangements. See Op. Ltr. 91-17A at 4; Reply to Br. in Opp. App. 5a. Thus, the Department consulted the common law factors—which pointed to the conclusion that the employees were plainly *not* employees of Synesis—and saw no reason to depart from the conclusion that would be drawn from the application of those factors.

Similarly, in response to a request for advice as to whether certain milk vendors were employees under the Act, the Department noted that it did not appear that "the relationship between the milk suppliers and the milk vendors has any of the characteristics generally found in the relationships of employers and employees." Dep't of Labor, Op. Ltr. No. 81-88A, at 4 (July 9, 1981). The Department sent the requester a copy of a recent decision "applying a common law test in determining whether an individual was an employee or an independent contractor," which discussed "some of the factors which may be relevant" to determining employee status under ERISA. *Ibid.* While emphasizing common law factors, however, the Department has stressed that the term "employee" must be "interpreted broadly," and may include persons "who under common-law rules would not be deemed to

be 'employees.'" Dep't of Labor, Op. Ltr. No. 77-75A, at 3 (Sept. 21, 1977).[13]

b. In its administration of Title II of ERISA, the IRS has also applied a test based primarily on common law factors.[14] In *Professional & Executive Leasing, Inc.* v. *Commissioner*, 89 T.C. 225, 230-231 (1987), aff'd, 862 F.2d 751 (9th Cir. 1988), a company devised a scheme to evade the minimum participation rules of 26 U.S.C. 401 and 410 in order to allow professionals to make themselves, but not their staffs, eligible for pension benefits.[15] Under the scheme, the professionals incorporated their practices and entered into service contracts with an agency that set up pension plans for the contracting professionals and then "leased" the professionals back to their professional corporations. The IRS determined that the professionals were not employees of the leasing agency, so that the plan did not qualify for favorable tax treatment. The Tax Court upheld that ruling, and agreed with the IRS's argument that "[t]o determine the existence of an

[13] In the same opinion letter, the Department suggested that one factor—whether a person is an employee under the Federal Insurance Contributions Act (FICA)—was controlling. Dep't of Labor, Op. Ltr. No. 77-75A, at 3-4. However, in view of this Court's decision in *CCNV* v. *Reid*, which concluded that "[n]o one of these factors is determinative," 490 U.S. at 752, the Department now believes that all of the factors must be considered.

[14] This case turns on the meaning of Section 3(6), a matter within Labor's jurisdiction, but its resolution will affect the determination of whether pension rights have vested, a matter primarily within the IRS's jurisdiction, and with respect to which the Secretary of Labor is to follow the IRS's approach. See Reorg. Plan No. 4 of 1978, § 101, 5 U.S.C. App. at 1374.

[15] The minimum participation rules prohibit employers from qualifying a pension plan for the tax benefits available under Title II of ERISA if the plan does not provide benefits to a broad group of employees. The statute provides alternative methods for qualifying under the minimum participation standards; for example, a plan may be qualified if 70% of all employees benefit from the plan. 26 U.S.C. 410(b)(1)(A).

employer-employee relationship we must look to common law concepts." 89 T.C. at 231.[16] As the Tax Court recognized (*id.* at 231 & n.10), the IRS generally has relied on the common law test set out in its regulations under the Federal Insurance Contributions Act (FICA), 26 C.F.R. 31.3121(d)-1(c), to determine employee status.[17]

Thus, both agencies charged with interpreting ERISA have relied primarily on the common law factors in determining whether a person is an employee for coverage purposes. Yet as indicated by this Court's decisions construing analogous social legislation, the focus is not strictly on "control" but on all of the factors considered as a whole. Especially in close cases, the common law test must be applied with reference to Congress's purposes in enacting ERISA.[18]

2. Other than the court below, all of the courts of appeals have looked primarily to the common law test to determine who is an "employee" under Section 3(6) of ERISA. In *Wolcott* v. *Nationwide Mut. Ins. Co.*, 884 F.2d 245, 250 (1989), the Sixth Circuit expressly re-

[16] See also *Burnetta* v. *Commissioner*, 68 T.C. 387, 397 (1977) ("[i]n determining whether or not an individual is an 'employee' for purposes of section 401, we must look to the common law concepts used in making such a determination"); Rev. Rul. 75-35, 1975-1 C.B. 131 (where a doctor formed a professional corporation with himself as the sole employee and a service corporation that employed his staff, the staff members were employees of the professional corporation for the purposes of ERISA's minimum participation requirements). Congress has recently enacted a special provision, 26 U.S.C. 414(n), governing employee leasing.

[17] The IRS elaborated on that regulation, and on the common law test, in Rev. Rul. 87-41, 1987-1 C.B. 296. The Ruling sets out 20 factors to be used in determining whether a person is an employee.

[18] For example, in a case such as the one involving the leasing of professional employees, the IRS would properly look skeptically on arrangements designed to mirror the appearance but not the reality of an employer-employee relationship under the common law. See, *e.g.*, *Holt* v. *Winpisinger*, 811 F.2d 1532, 1534 (D.C. Cir. 1987) (clerical worker paid like, and listed as, independent contractor).

jected the approach taken by the Fourth Circuit in this case, and concluded that "the better reasoned position on [the] meaning of the term 'employee' is set forth in *Holt* [v. *Winpisinger*, 811 F.2d 1532, 1538 n.44 (D.C. Cir. 1987)]." Accord *Plazzo* v. *Nationwide Mut. Ins. Co.*, 892 F.2d 79 (Table) (6th Cir. 1989) (applying common law principles to find that a Nationwide agent was not an "employee" under ERISA), cert. denied, 111 S. Ct. 370 (1990).

In *Holt*, the District of Columbia Circuit held that "one must look to the common-law rules of agency to determine employee status" under ERISA. 811 F.2d at 1538. Furthermore, in *Mayeske*, 905 F.2d at 1553-1555, the D.C. Circuit affirmed its reliance on common law agency principles, noting that such reliance was particularly appropriate in light of this Court's decision in *CCNV* v. *Reid*, where the Court's findings with respect to whether a sculptor was an employee of the organization that commissioned his work "mirrored the Restatement (Second) test." *Id.* at 1554 n.8. Similarly, the Fifth Circuit recently expressed its disagreement with the Fourth Circuit's test, holding that "because Congress provided no specific statutory definition of 'employee' under ERISA we properly apply the common law of agency." *Penn* v. *Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096, 1102 n.6 (1990).[19]

Thus, the other courts of appeals have properly emphasized reliance on the conventional common law test set forth in Section 220 of the Restatement. See *Mayeske*,

[19] The Seventh and Eighth Circuits have applied the common law test in cases arising under ERISA, but appear to have done so in order to determine the intended coverage of a particular plan, rather than to determine what Congress meant in Section 3(6). See *Short* v. *Central States, S.E. & S.W. Areas Pension Fund*, 729 F.2d 567 (8th Cir. 1984); *Richardson* v. *Central States, S.E. & S.W. Areas Pension Fund*, 645 F.2d 660 (8th Cir. 1981); *Wardle* v. *Central States, S.E. & S.W. Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980), cert. denied, 449 U.S. 1112 (1981).

905 F.2d at 1554-1555; *Penn*, 898 F.2d at 1102-1103.[20] But while those courts have avoided the erroneous path taken by the court below, it is unclear whether they are giving appropriate weight to this Court's decisions involving remedial social legislation—such as *Rutherford Food*, *Silk*, and *Bartels*—in cases where a rigid application of the common law test may be inconsistent with congressional intent.[21]

[20] To our knowledge, no court has strictly applied the common law test in interpreting ERISA. That is, no court has expressly restricted its analysis to whether the "employer" had the right to control the "employee" such that it would be proper to hold the "employer" vicariously liable for torts committed by the "employee" while acting within the scope of his duties.

[21] In *Penn*, the Fifth Circuit relied almost exclusively on this Court's decision in *CCNV* v. *Reid*, which involved the Copyright Act rather than remedial social legislation. See 898 F.2d at 1102-1103. That focus may have led it to an erroneous result. The court concluded that an individual who had been an employee of an engineering company for nine years and then left the company for a few months returned to the company as an independent contractor, and therefore his pension rights did not vest (as they did for all "employees" pursuant to 26 U.S.C. 411(d)(3)) when the company terminated its pension plan. The court reached that result even though upon his return the individual did the same work (apparently at the same desk and for the same supervisors) that he did while he was unquestionably an employee, and even though he did that work at the engineering company's offices with the company's tools. *Id.* at 1098, 1103. The court emphasized as an especially "significant factor" an agreement that the individual signed upon his return that designated him as an independent contractor. *Id.* at 1103 & n.9. The decision was probably erroneous under the common law test. See, *e.g.*, *Wright* v. *United States*, 537 F. Supp. 568, 570 (N.D. Ill. 1982) ("[t]he self-serving characterizations of the parties are irrelevant"); *Singer* v. *Star*, 510 So. 2d 637, 640 (Fla. Dist. Ct. App. 1987) (reversing a grant of summary judgment in favor of a newspaper alleged to be responsible for the torts of a person who sold subscriptions, where the trial court relied heavily on a contract designating the person as an independent contractor). In any event, proper consideration of the purposes of ERISA would likely have tipped the scales in favor of the individual claiming to be an employee, since ERISA's vesting provisions are central to the statute's

C. The Court Of Appeals Erred By Abandoning The Common Law Test And Concluding That Darden Was An Employee Of Nationwide

1. a. In this case, the Fourth Circuit said that "the common-law test for the relationship of master and servant is not the appropriate standard for application," Pet. App. 40a, and the test it devised bears no relation at all to the test set out in Section 220 of the Second Restatement of Agency. To the contrary, the Fourth Circuit's test is drawn entirely from the congressional statement of purpose set out in Section 2 of ERISA. While in our view such factors may be influential in a close case, they do not by themselves constitute a definition of "employee." To the contrary, as this Court has repeatedly recognized, when Congress uses the term with little or no elaboration, it does so against the background of the common law meaning of the term. See *CCNV* v. *Reid*, 490 U.S. at 739-740. The Fourth Circuit's test accordingly conflicts with the principles of decisions adopted by this Court in those cases.

b. The Fourth Circuit's test also has little apparent connection to the ordinary meaning of the word "employee." That is, the factors of the common law test—which show whether a person is subject to the control of another in performing his tasks—plainly relate to whether a person is an employee in common parlance. But no ordinary definition of "employee" would focus on the anticipation of retirement benefits, reliance on those benefits, and relative bargaining power.[22]

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remedial scheme. See J. Langbein & B. Wolk, *Pension and Employee Benefit Law* 82 (1990). That would be particularly so if, for example, there was evidence that the company designated an individual as an independent contractor solely for the purpose of preventing his pension rights from vesting when the plan was terminated.

[22] In fact, those matters seem to have little to do with whether a person is an "employee." First, whether a person who is eligible for benefits under a program "anticipated" the receipt of benefits

c. The Fourth Circuit's test could not have been intended by Congress because it creates an unacceptable degree of uncertainty, since employment status would depend in large part on what the individual anticipated, whether he relied on the retirement program at issue, and whether he had bargaining power individually or collectively. That uncertainty would prevent employers from determining whether a benefit plan was subject to ERISA, even though, for example, an insurance company establishing a plan for agents comparable to Nationwide's deferred compensation plan would reasonably want to know, at the outset, whether it was required to comply with ERISA's funding, reporting, and disclosure requirements, and whether it was entitled to the favorable tax treatment accorded qualifying plans.

In applying the Fourth Circuit's test and deciding that Darden was an employee, the district court relied heavily on the fact that Darden had saved only about $18,000 through other retirement programs; that fewer than half of the Nationwide agents like Darden participated in a Keogh Plan or had an individual retirement account; and that Nationwide, by and large, had not followed the suggestions of an advisory council of insurance agents. Pet. App. 18a-23a. Plainly, under the Fourth Circuit's standard Nationwide could not have known in advance whether its plan was a "pension plan" under Section 3(2)(A) of ERISA—which states that a "pension plan" is a plan that provides retirement income to *employees* or results in a deferral of income by *employees*. In fact, Nationwide's plan would presumably cease to be a pension plan under the Fourth Circuit's approach if, over

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is not particularly helpful in distinguishing employees from others who perform service. Second, it is not clear why a person who participates in a retirement benefits program is an employee while another person, who does the exact same work but prepares for retirement through his own investments, is not. Third, persons who negotiate through unions may have considerable bargaining power, but that does not make them independent contractors.

the next few years, a large number of Nationwide agents decide to participate in its Keogh plan and the suggestions of the advisory council are generally implemented. The legal status of a plan should not depend on the occurrence of such events.

2. a. In our view, the district court approached this case properly and reached the correct result in its initial decision. As to approach, the district court considered the various factors set out in the common law test but, relying on this Court's decisions in *Silk* and *United Insurance Co.*, assessed those factors in light of the "total factual context." Pet. App. 50a. As to result, although it is clear that Darden relied on Nationwide to a significant degree and represented that company exclusively for 20 years, it is also clear that he was an independent contractor. Darden paid his own business expenses and was free to incorporate his business, to set his own hours, to solicit business as he saw fit, and to hire and fire his own employees. *Id.* at 49a. He was compensated through commissions, reported his own income, and paid taxes as an independent businessman. *Ibid.* In sum, "it was primarily through [Darden's] own efforts, ingenuity, and good business sense that he made money, and not through any employment relationship with Nationwide." *Ibid.*[23]

b. This construction of "employee" also conforms to congressional use of that term in other contexts. In FICA legislation, Congress has made clear that it understands that insurance agents are often not "employees" under common law principles. Congress provided that

[23] In *Wolcott*, the Sixth Circuit specifically disagreed with the approach taken by the court below, and concluded that a Nationwide insurance agent like Darden was an independent contractor. 884 F 2d at 250-251. Like the district court in this case, the Sixth Circuit held that the agent was an independent contractor because he "hired his own employees and exercised managerial skill in the operation of his business," as shown by the fact that he operated his own office, managed his own staff, was paid on a commission basis, and reported his income to the IRS as a self-employed individual. *Id.* at 251.

"employee" means "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of employee," 26 U.S.C. 3121(d)(2), and added that the term embraces certain others, including "a full-time life insurance salesman," 26 U.S.C. 3121(d)(3)(B). But even in extending FICA's reach, Congress made clear that it did not intend it to cover persons like Darden even if they sold only life insurance, since Congress further provided that such salesmen are not employees for FICA purposes if they have "a substantial investment in facilities used in connection with the performances" of their services, 26 U.S.C. 3121(d)(3), and Darden "owned the building housing his agency's offices and the furniture used there, as well as an automobile maintained for business purposes," Pet. App. 39a.

c. This result is also consistent with the purposes of ERISA. ERISA does prohibit clauses such as Nationwide's forfeiture provision, see Rev. Rul. 85-31, 1985-1 C.B. 153; *Hummell* v. *S.E. Rycoff & Co.*, 634 F.2d 446, 449-450 (9th Cir. 1980), but forfeiture clauses were made invalid in order to protect "employees" from the loss of vested benefits as a sanction for disloyal conduct. See H.R. Rep. No. 807, 93d Cong., 2d Sess. 60 (1974); H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 271 (1974); 120 Cong. Rec. 29,197 (1974). Nothing in the Act or its legislative history suggests that Congress intended to prohibit forfeiture provisions in plans that provide benefits to persons who are independent contractors running their own businesses, rather than employees. And nothing about the facts of this case suggests that Nationwide attempted to disguise insurance agents like Darden as independent contractors in order to evade ERISA's requirements. In such instances, where the plan in question can fairly be regarded as part of a transaction between business entities, the protection of ERISA's nonforfeitability rule should not be extended to cover independent contractors.

If an agent such as Darden is an employee, then all retailers operating under the provisions of an exclusive dealing arrangement—including, for example, many automobile dealership owners and other franchisees—are potentially employees. Such a result would stretch the common law test far beyond its limits and is not justified by an analysis of the relevant ERISA policies.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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